IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.269 OF 2001

Shrikrishna Pralhad Mahakal,
Age 29 years, r/o Village -
Belpada, Taluka Panvel,
District - Raigad,
at present detained at
Yerawada Central Prison,
Pune. .. Appellant.
(Orig.Accused No.1)

Vs

The State of Maharashtra, .. Respondent

Shri S.R.Chitnis, Senior Advocate with Mr S.V.Kotwal, for the appellant.

Shri S.S.Tatkare, APP for the respondent.

CORAM : Smt.Ranjana Desai &
D.B.Bhosale, JJ.

DATE : 10th August, 2005.

JUDGMENT: (Per D.B.Bhosale, J.)

1. The appellant-husband has been convicted by the trial Court, vide its judgment dated 15.3.2001, of the offences punishable under sections 302 and 498-A of Indian Penal Code, (for short "IPC") on the allegations that he subjected his wife Deepa to cruelty and on 4.3.2000 at 10 am killed her by pouring kerosene and set her ablaze. The appellant was charged and tried along with his parents, married sister and brother of the offender under sections 302, 109 read with 302, 498-A

read with 34 IPC. Except the appellant, all other accused have been acquitted by the impugned judgment rendered in Sessions Case No.69 of 2000.

2. Briefly stated, the prosecution case unfolded from the evidence led by the prosecution, is that deceased Deepa and the appellant-accused (for short, "the accused" only) got married on 7.8.1999 at Buldhana. After marriage, for a month they stayed with his parents and brother at their native place. Thereafter, they shifted to Kendra Vihar, Kharghar, New Bombay. After staying there for some time, they shifted to Mhatre Chawl Belpada, Taluka Panvel, where the alleged occurrence took place. It is alleged that during their stay at native place, the other accused subjected the deceased to cruelty so as to coerce her parents to fulfil their demand of money. Even when they shifted to Khargar and then to Belpada she was subjected to cruelty by her husband for fulfilment of their demand of money from her parents. It is alleged that on 4.3.2000 at 10 am once again the accused insisted that the deceased should bring money from her parents and when she refused the accused allegedly closed the door from inside and poured kerosene on her person and set her ablaze. She raised a hue and cry, when, according to the prosecution, the neighbours rushed to their house and

doused the fire. Thereafter, she was removed to MGM Hospital. She had sustained 97 percent burns. She succumbed to the injuries on 7.3.2000. During her stay in the hospital, the police recorded her statement on 5.3.2000 at 10.15 am (Exh-52A), which was treated as FIR and in pursuance thereof the offence came to be registered against the accused and the other members of his family under sections 307, 498-A read with 34 of IPC bearing C.R.No.36/2000. After she succumbed to the injuries, the offence under section 302 was added. The investigation was set in motion and in the course of investigation the statements of several witnesses were recorded, panchanamas were drawn and on completion of the investigation, the chargesheet was filed against all the five accused and they were accordingly tried by the learned Addl.Sessions Judge, Raigad. The defence propounded by the accused was of total denial.

3. In the course of trial, the prosecution examined as many as 11 witnesses, mainly consisting of Heerabai Mhatre (pw 2), owner of the house where the alleged incident occurred and to whom an oral dying declaration was made by the deceased; Nilkanth Tathe (PW 3), father of the deceased, who also speaks about the illtreatment meted out to the deceased; Dr Prem Sinha (PW 4) and Dr. Radha Jain (PW 5), who treated Deepa while in the hospital; Nittila Shetty (PW 6),

Special Executive Magistrate, who recorded the dying declarations of deceased Deepa (Exhibits 45 and 47); PSI Rathod (PW 7), who recorded the statement of the deceased (Exh- 52A). The prosecution also examined Dr Shinde (PW 9), who examined the accused and also performed autopsy on the dead body of deceased Deepa. API Eknath Patil (PW 11) conducted the investigation in the alleged offence. To prove the allegations of illtreatment, besides the oral evidence, some letters are produced on record by the prosecution.

4. The conviction under section 302 IPC in the instant case is based on the evidence in the nature of dying declarations recorded by PSI and SEM and their testimonies in support thereof. Insofar as the oral dying declaration made to Heerabai Mhatre is concerned, the trial Court did not find her evidence worthy of credence. It is against this backdrop, Mr Chitnis, learned senior counsel, at the outset, submitted that he has instructions to press this appeal only against the conviction of the accused under section 302 of IPC. In other words, he made it clear that he is not challenging the order of conviction of the accused under section 498-A of IPC and in view thereof while making submissions he concentrated on the evidence led by the prosecution to prove the dying declarations only. He fairly stated that there is sufficient evidence on

record to sustain the order of conviction under section 498-A against the accused. A perusal of the impugned Judgment and the evidence placed on record also shows that the conviction under section 498-A IPC is proper and does not deserve interference.

5. Mr.Chitnis, learned senior counsel, took us through the first dying declaration (Exh-52A) recorded by PSI on 5.3.2000 at 10.15 am, the second dying declaration (Exh-45) recorded on the very day at 10.30 am and the third dying declaration (Exh-44) recorded at 7.55 pm as also the memorandum (Exh-47) dated 4.3.2000. He also took us through the evidence of PSI Rathod (PW 7), who recorded the first dying declaration (Exh-52A); Shetty (PW 6), who recorded the two dying declarations (Exhs-45 and 44); and the evidence of Dr.Prem Sinha (PW 4) and Radha Jain (PW 5) in particular and submitted that the dying declarations, being inconsistent and suffer from several infirmities, deserve to be discarded. Mr Chitnis submitted that insofar as the dying declarations (Exhs.-45 and 47) recorded by Shetty (PW 6) are concerned, they cannot be looked into at all since at the relevant time he was not having authority to record the dying declaration inasmuch as he was no more Special Executive Magistrate. Our attention was also drawn to Exhibit-44, the dying declaration recorded

by Shetty (PW 6) on 5.3.2000 at 7.55 pm to contend that this witness is pliable witness in the hands of police. He had no reason and occasion to go and record the second dying declaration (Exh-44). Moreover, there is no record to show that Shetty was sent by the police for recording the second dying declaration (Exh-44). The dying declarations recorded by Shetty (PW 6) were also challenged on the ground that the 'scribe', who wrote down Exhibits 47 and 44, was not examined. In support of this contention, heavy reliance was placed on the proposition that if the dying declaration is in writing, the scribe must be produced in the Court as laid down by the Apex Court in **Sudharkar Vs. State of Maharashtra, (2000) 6 SCC 671**. Mr Chitnis also submitted that the SEM did not know Marathi and, therefore, the prosecution ought to have examined the writer/scribe of the dying declarations (Exhs.- 44 and 47). He further submitted that the omission to seal the first dying declaration (Exh.-47) after recording and handing it over to the police further supports that Shetty was pliable witness. In so far as the dying declaration recorded by Rathod is concerned, it was challenged mainly on the ground that it was wrongly treated as FIR. As a matter of fact, according to Mr Chitnis, the station diary entry recorded at 12.30 pm on 4.3.2000 discloses cognizable offence and, therefore, it ought to have been treated as

FIR. The said station diary entry does not implicate the accused at all and it clearly shows that it was a case of suicide. It was next contended by Mr Chitnis that deceased Deepa was not physically as well as mentally fit to give the statements to PSI Rathod (PW 7) and SEM Shetty (PW 6). In support of this contention, he took us through the medical papers to show that her general condition was very poor, her blood pressure and pulse was not recordable and she was given painkillers. Our attention was also drawn to the inconsistencies in the dying declarations and submitted that they make the dying declarations doubtful. In the alternative, he submitted that looking to the infirmities in recording of the dying declarations and inconsistencies in material particulars benefit of doubt be given to the accused.

6. On the other hand, Mr Tatkare, learned APP submitted that the statement (Exh-52A) recorded by Rathod (PW 7) clearly discloses the cause of death of Deepa and, therefore, it was rightly treated as FIR. He further submitted that so far as the station diary entry at 12.30 pm dated 4.3.2000 is concerned, a bare perusal would show that it does not disclose any cognizable offence and, therefore, it could not have been treated as FIR. Our attention was drawn to the endorsement made

by the doctors on the dying declarations stating that the deceased was conscious, oriented and, therefore, fit for giving statement. The said endorsements, according to the learned APP, were sufficient to hold that the deceased was physically as well as mentally fit to give the statement. A bare reading of the statements given by the deceased, according to the learned APP, inspire full confidence in its truthfulness and credence. It was not as a result of either tutoring or prompting or a product of imagination and, therefore, it was rightly believed and relied upon by the trial Court to record the order of conviction. In support of this submission, the learned APP placed reliance upon the judgment of the Apex Court in **Laxman Vs State of Maharahstra, AIR 2002 Supreme Court 2973**. Insofar as the submission of Mr Chitnis in respect of the scribe is concerned, he submitted that the word "scribe" means a recorder and not the one who actually writes down the statement. In other words, he submitted that the scribe in the present case was Shetty (PW 6) and not the one who actually wrote down the statement of the deceased. He next submitted that both the dying declarations are consistent in so far as the ghastly act of killing the deceased Deepa is concerned. The judgment relied upon by Mr Chitnis, according to Mr Tatkare, would not apply to the facts of the present case.

7. The conviction of the accused is based upon the dying declarations of the deceased which were recorded by Shetty (PW 6) and Rathod (PW 7). The learned Sessions Judge held that the dying declarations made by the deceased to be truthful, voluntary and trustworthy. While recording this finding, the learned trial Judge referred to and relied upon the evidence of the doctors as also of Shetty (PW 6) and Rathod (PW 7) in particular.

8. The law on dying declaration is well settled by now. Clause (1) of section 32 of the Indian Evidence Act, 1872 provides that a statement made by a person, who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of his death comes into question, is a relevant fact and is admissible in evidence. Section 32(1) is an exception to the general rule that hearsay evidence is not admissible or that unless evidence is tested by cross-examination, it is not credit-worthy. Reliability of such statement/declaration should be subject to a close scrutiny, considering that it was made in the absence of the accused who has no opportunity to test its veracity by cross-examination. If there are more

than one dying declarations, then the court is also to scrutinise all the dying declarations to find out if each one of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. Once the statement of the dying person and the evidence of the witness or witnesses testifying to the same is found reliable on careful scrutiny, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment, such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. There is no rule that a dying declaration cannot be acted upon unless it is corroborated. If the circumstances surrounding the dying declaration are not clear or convincing then the Court may look for corroboration. It is also well settled that a dying declaration before police officer is also admissible in evidence if after making a statement, the victim succumbs to the injuries, such statement can be treated as a dying declaration and is admissible under section 32(1) of the Indian Evidence Act as long as it is related to the cause of death. Moreover, there is no requirement of law that dying declaration must

necessarily be made to the Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. There is no legal impediment in founding the conviction on the dying declaration if the Court is satisfied after careful scrutiny that the dying declaration was true and was free from any effort to prompt the deceased to make such a statement and is coherent and consistent. Furthermore, the dying declaration need not be in question and answer form. It could be accepted as a true and voluntary statement even if it is recorded in narrative form. Keeping all these well settled principles of law in view, we would now like to consider the submissions urged by the learned counsel on behalf of the parties to find out whether the learned trial Judge was right in convicting the accused under section 302 of IPC solely on the basis of the dying declarations.

9. Dr.Prem Sinha (PW 4) was attached to MGM Medical College Hospital. He was on duty when deceased Deepa was admitted in the hospital. He produced all the medical papers in respect of deceased Deepa. He noticed that she suffered 97 % burns. She was taken to the hospital by the Police Inspector and her husband. When she was admitted in the hospital, her general condition

was very poor, pulse and blood pressure was not recordable and there were bilateral crepts in the chest. The patient was in semi-conscious condition due to neurogenic and hypovolumic shock. She was given painkiller along with antibiotics. Even in the evening of 4.3.2000, her general condition was very poor and her pulse was not palpable. On 5.3.2000, though her general condition was still poor, Dr.Sinha has stated that she was conscious and oriented since 9 am onwards. In the cross-examination, he has fairly admitted that on 5.3.2000 at 9 am he did not examine her. In view of this admission in the cross, it was vehemently contended that there was no basis for Dr.Sinha to state that from 9 am onwards she was conscious and oriented. we are unable to accept this submission simply because the medical papers on record clearly show the endorsement that she was conscious and oriented from 9 am onwards and Dr.Sinha appears to have stated so on the basis thereof. At 4 pm it appears that Dr.Sinha (PW 4) talked to deceased Deepa. We perused the medical papers of Deepa, produced by Dr.Sinha, very carefully. They clearly lend assurance to the defence version that she was admitted in the hospital by the accused and the Police Inspector. The medical papers further show that Deepa’s general condition was very poor, her pulse and blood pressure was not recordable and that she was also

given several injections. Probably that was the reason why the police and the SEM were not allowed to record her statement on 4.3.2000. The medical papers actually show that on 5.3.2000 at 9 am Deepa was conscious and oriented. We find absolutely no reason to discard the entries in the medical papers which clearly show that Deepa was conscious and oriented from 9 am onwards on 5.3.2000. Merely because her general condition was very poor does not mean that she was not conscious and oriented and medically fit to give statements to the police and SEM. Even the entry made at 8.30 pm on 6.3.2000 also shows that deceased Deepa was conscious and oriented. Dr.Radha Jain (PW 5), one of the doctors who attended deceased Deepa, corroborates the testimony of Dr.Sinha (PW 4) in all respects and we did not find any discrepancy whatsoever in the evidence of these two doctors. Dr.Radha Jain had given permission and certificate to that effect to PSI Rathod (PW 7) and SEM Shetty (PW 6), allowing them to record the statement of deceased Deepa. She has given detailed account as to when Rathod and Shetty approached her and when she made endorsement to the effect that Deepa was fully conscious and oriented. We find the testimonies of both these witnesses quite clear, categorical and implicitly reliable and corroborated by medical papers on record. The defence could not and did not elicit anything in the

cross-examination so as to shake these witnesses. We find absolutely no reason to disbelieve them.

10. Our attention was drawn to Exhibit-40. This is a letter dated 4.3.2000 of the investigating officer addressed to the medical officer seeking permission and opinion of the doctor to record her statement. An endorsement was made by Dr.Radha Jain on this letter shows that the patient was not physically and mentally fit to give statement. On the basis of this letter it was vehemently contended that as to why similar written permission was not sought either by PSI Rathod or by SEM Shetty on 5.3.2000 before recording the statements of deceased Deepa and/or made any effort to seek a written permission indicating that she was conscious and oriented. It is true that no such permission was sought on 5.3.2000. However, the medical papers clearly show that deceased Deepa was conscious and mentally fit (oriented) to give statement on 5.3.2000. Further more, the statements recorded by Rathod (Exh-52A) and by Shetty (Exh-45) clearly show that before recording the statement of the deceased Deepa, an endorsement of Dr.Radha Jain (PW 5) stating that she was mentally fit to give statement, was obtained by them. In view of this, merely because no written permission was sought by the investigating agency before recording the

statements/dying declarations of deceased-Deepa, it cannot be said that the deceased was not conscious and oriented, particularly when there is sufficient material on record to show that at the relevant time she was conscious and oriented. Moreover, there is no requirement of law to seek such written permission of the doctor before recording a statement of the patient in a hospital. A simple endorsement/certificate of a doctor indicating mental condition of the patient on the statement itself would be sufficient compliance of law. We find absolutely no merit in the said submission of Mr Chitnis.

11. That takes us to consider the evidence of Rathod (PW 7) and Shetty (PW 6) as also the statements (Exhs-52A, 44 and 45) recorded by them. Shetty (PW 6) went to the hospital at the instance of PSI Nikam (PW 10) on 4.3.2000 and since, according to the doctor, deceased Deepa was not medically fit to give a statement, he did not record her statement. Next day, between 10 and 10.30 am, he again went to the hospital. He was informed that deceased Deepa was mentally fit to give a statement and, therefore, he proceeded to record her statement. He took the help of a neighbouring patient whenever he faced difficulty in understanding the deceased who was giving her statement in Marathi.

This witness though claims that he understands Marathi, seems to have had difficulty in taking down her statement in black and white. He, therefore, took an assistance of a visitor who had come to see the neighbouring patient for taking down the statement in writing. Same day evening he was again called by the police at MGM Hospital and requested him to record a further statement of deceased Deepa. He, accordingly, recorded her second statement (Exh-44) in which she simply stated that she had no grievance against Vithal Pohare, husband of Sunita, original accused no.5. That statement is also in the handwriting of the same person, who had written down the first statement (Exh-45). When Shetty (PW 6) was asked in the cross-examination about the handwriting he explained that the same visitor of the neighbouring patient was available in the evening also. It was tried to be contended that though, according to the prosecution, the handwriting on Exhibits 44 and 45 is of one and the same person, in fact it was of different persons. We, ourselves, perused both these documents (Exhs 44 and 45) and found no merit in the submission. A bare look at both these documents clearly shows that they are written by one and the same person. In our opinion, it was quite probable and natural that the same visitor of the neighbouring patient, who was available in the morning, was also

available in the evening and, therefore, his assistance was sought in taking down the second statement of deceased Deepa. We find no reason to disbelieve this part of his testimony. However, the fact remains that Shetty (PW 6) sought assistance of a third person in taking down a statement of Deepa since he had difficulty in writing down in Marathi. He also seems to have had difficulty in understanding Marathi and hence he had to take assistance of the neighbouring patient, as stated in paragraph 3 of the examination-in-chief, whenever he had difficulty in understanding Marathi language. It is against this backdrop, Mr Chitnis relied upon the judgment of the Apex Court in **Sudhakar and Anr Vs. State of Maharashtra** (supra) and urged that the said scribe ought to have been produced in Court. The learned counsel for the parties raised a controversy as to what is "scribe" whether a "recorder" or one who actually writes down at the instance of the recorder, as happened in this case. We do not wish to enter into this controversy since we are of the opinion that the prosecution ought to have examined the said writer, who wrote down the statements of Deepa, in view of the fact that Shetty (PW 6) was not a Maharashtrian and his understanding of Marathi language was not satisfactory, which is evident from the fact that he had to take assistance of third person in understanding Marathi

language of deceased Deepa. However, in our opinion, merely because the said third person was not examined, the statement recorded by Shetty cannot be discarded if it is otherwise found to be true and trustworthy and at the same time receives sufficient corroboration from other sources.

12. There are two dying declarations on record, one recorded by Shetty (PW 6) and other by Rathod (PW 7). Therefore, it will have to be seen whether a plain reading of both the dying declarations inspires confidence. We have already observed that they both independently pass the test of mental fitness of the deceased. However, it will have to be seen whether they are consistent and at the same time true and trustworthy keeping in view that the prosecution has relied only on the dying declarations to bring home the guilt of the accused under section 302 IPC. We propose to examine both the dying declarations to find out whether or not they inspire confidence and they are free from embellishment, little later.

13. At this stage, we would like to examine the submission that the statement Exhibit 52A was wrongly considered as FIR. According to Mr Chitnis, learned senior counsel, the station diary entry (Exh-67)

recorded at 12.30 pm on 4.3.2000 clearly gives information of cognizable offence and, therefore, it ought to have been treated as FIR. At the outset, let us observe that the station diary entry made at 12.30 pm, on the basis of telephonic message, does not disclose any offence, much less a cognizable offence. It simply records that deceased Deepa and the accused were admitted in the MGM hospital with burn injuries. It does not even remotely disclose any offence. As against this, the statement (Exh-52A) clearly gives information as to the cause of burn injuries sustained by deceased Deepa which ultimately resulted into her death. Moreover, it is now well settled that a cryptic telephonic message cannot be considered as FIR. The submission that the station diary entry made at 12.30 (Exh.67) ought to have been treated as FIR, must be rejected.

14. The authority of Shetty (PW 6) was also challenged on the ground that he was no more a Special Executive Magistrate as on the date on which he recorded the dying declarations (Exhs.-44 and 45). Shetty was confronted with the Gazette Notification dated 24.11.1999, by which the appointments of all Special Executive Magistrates in the State of Maharashtra were cancelled. He fairly stated that he was not aware about

such notification. The notification clearly shows that Shetty was not a Special Executive Magistrate as on the date of recording the dying declaration. However, there is no requirement of law that the dying declaration must be necessarily made to the Magistrate. What evidentiary value or weight has to be attached to such statement depends on the facts and circumstances of each particular case. Keeping this settled position of law in view, we will examine whether the statements recorded by Shetty and Rathod are worthy of reliance and credence.

15. Rathod (PW 7) recorded the statement of deceased Deepa after taking permission and obtaining doctor's certificate regarding her mental fitness. The statements recorded by Rathod and Shetty both are in descriptive form. Admittedly, the statement recorded by PSI Rathod (PW 7) was first in point of time. It was recorded at 10.15 am on 5.3.2000 whereas Shetty (PW 6) recorded the statement at 10.30 am. If the timings mentioned in both these statements (Exhs-45 and 52A) are correct, it means that they were recorded one after another. We find both the statements (Exhs-45 and 52A) are equal in size/length. Shetty (PW 6) has stated in the cross-examination that he took 40-45 minutes to record the statement (Exh-45) whereas Exhibit 52A shows

that Rathod (PW 7) took about 15 minutes. The endorsement of the doctor in the form of certificate obtained on Exhibit-45 was at 10.30 am and on Exhibit 52A at 10.15 am were made before recording of the statements. We do not wish to enter into a question as to how Rathod (PW 7) could record the statement in 15 minutes. Shetty (PW 6) probably required more time because he had to take assistance of others for taking down the statement in black and white and understanding the Marathi of the deceased. It is also clear from the testimonies of Shetty and Rathod that both were present in the Ward when the statements of deceased Deepa were being recorded. We fail to understand if both (PWs 6 & 7) reached the hospital at one and the same time why did they record independent statements of the deceased. It is against this backdrop we proceed to examine a core question whether the statements Exhibits-45 and 52A are true and free from embellishment.

16. For considering the core question it would be advantageous to quote the relevant portion of Exhibits 52A and 45 for better appreciation of the submissions and to find out whether they are true and worthy of credence. A true translation of the relevant portion of Exhibit 52A recorded by Rathod (PW 7) at 10.15 am on 5.3.2000, reads thus :

> "On 4.3.2000 at 10 am my husband Shrikrishna, over the aforesaid reason, used to ask me to bring money from my parental house. Similarly, my sister-in-law (husband's sister) was pestering my husband asking me to bring money otherwise drive her out and saying so, my husband closed the door and took the kerosene tin and poured the same on my person and set me on fire by litting a match stick. At that time, I raised shouts loudly. There was also scuffle between me and him and the people from neighbourhood came and doused the fire. I became unconscious. I do not know as to who brought me to the hospital. Now I am in fully conscious state."

The relevant five lines of the original Marathi statement (Exhibit-52A) reads thus:

The relevant portion of Exhibit-45 recorded by Shetty (PW 6) at 10.30 am on 5.3.2000, reads thus :

> "Yesterday, the date 4.3.2000 at 10.00 am my husband told me that I should bring money from my parental house, parents. On refusing to it he bolted the door of the house from inside and poured rockoil (kerosene) from the Can, on the saree wearing on my person and lit the same by match stick and he opened the door and ran away. As he poured kerosene on the saree wearing on my person and lit the same by match stick and the way my saree started burning, I started raising shouts loudly and as a result the people in the neighbourhood came there, till then my body had sustained burns. They put out the fire, in the meantime, I became unconscious."

A bare perusal of the statement-Exhibit 52A shows that the alleged incident occurred at 10 am on 4.3.2000 and

at the relevant time the sister-in-law (i.e. Sunita - original accused no.5) of the deceased, was pestering the appellant-accused, for asking the deceased Deepa to bring money otherwise drive her (deceased) out and on she saying so the accused closed the door of the house and then poured kerosene and set her ablaze. A careful reading of the original Marathi statement shows that at the relevant time her sister-in-law was also present in the house. Except this statement, there is absolutely no evidence on record to show her presence in the house at the relevant time. It further shows that after the accused set deceased Deepa ablaze there was scuffle between him and the deceased. Thereafter, she shouted loudly which seems to have attracted the neighbours. It is pertinent to note that in this statement (Exh-52A) the deceased did not state that the accused after setting her ablaze opened the door and fled as stated in the statement - Exhibit-45. Similarly in Exhibit-45 she does not state that there was a scuffle with the accused. On the contrary, she has categorically stated (in Exhibit-45) that after the accused set her ablaze he opened the door and fled. These inconsistencies will have to be examined in the light of the defence and the testimony of Heerabai Mhatre (PW 2) who was one of the first persons to reach the scene of offence. The defence of the accused was that the deceased attempted

to commit suicide and that he tried to douse the fire and in that process he also sustained burns. We examined the testimony of Mhatre (PW 2), a landlady. When she reached the house of the accused the door was already opened by the people. Insofar as the oral dying declaration made by deceased-Deepa to Mhatre (PW 2) is concerned, the learned Judge has disbelieved her testimony. Obviously, because in the examination-in-chief she has stated that she asked the deceased as to how she sustained the burns and in the cross she states that she did not ask anything to the deceased at all. We have carefully gone through the testimony of Mhatre (PW 2). The trial Court has rightly discarded the oral dying declaration made to this witness. The other part of her testimony, in our opinion, can be accepted if that receives corroboration from the other evidence on record. According to this witness, when she reached the scene of offence she found the accused inside the house; he also tried to douse the fire; he asked for money from her (PW 2) since he wanted to make telephone calls to the police and to the family members of the deceased, he informed them about the alleged occurrence and that along with the police he carried Deepa to the hospital. When we cross checked the testimony of Mhatre, we found that part of Mhatre's testimony truthful since it was receiving corroboration

from other material on record. Admittedly, the accused sustained burn injuries for which he was treated in the same hospital by Dr. Shinde (PW 9). The injury certificate (Exhibit-59) issued by Dr.Shinde is on record. This certificate clearly supports the testimony of PW 2 to the extent that the accused did not flee as stated by the deceased in her statement Exhibit-45 and that he attempted to douse the fire. Further, it has also come on record that the accused made a telephone call to the police and informed them about the alleged occurrence. The entry in the station diary made at 12.30 on 4.3.2000 (Exh-67) to that effect clearly supports the testimony of PW 2. It also supports his claim that he took the deceased to the hospital. We have, therefore, no hesitation in accepting and relying upon the testimony of Mhatre (PW 2) to hold that the accused did not flee, he made calls to the police and her parents, he tried to douse the fire, he carried the deceased to the hospital, he stayed in the hospital till he was arrested and he signed all the necessary documents to comply with the formalities in the hospital. The medical papers (Exh-37) also clearly support her version to that extent.

17. Both these statements (Exhs.52A and 45) were recorded one after another. There was no time gap

between recording of these two statements. Despite that, a bare perusal of these statements/declarations would show that they are not consistent in all material particulars. The inconsistencies, as noticed above, undoubtedly create doubt about their veracity and in any case it cannot be said that they are free from embellishment. Merely because the deceased was conscious and oriented at the time of making the statement either to the police or to the Special Executive Magistrate, after obtaining certificate from the doctor to that effect, does not mean whatever has been stated by the deceased should be accepted as gospel truth. Reliability of such statement/ declaration should be subject to a close scrutiny, particularly when there are more than one dying declarations and they are not consistent with each other in all material particulars. It is true that once such statement/s is/are found reliable on careful scrutiny, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from embellishment, such dying declaration/s can be acted upon to record conviction even without looking for any corroboration. In the present case, to bring home the guilt of the accused, except the evidence in the nature of dying declaration, no other evidence was pressed into service. A careful scrutiny of both

the dying declarations and other evidence show that except a part of the statement that the accused poured kerosene and set the deceased ablaze, there is no consistency in the statements. We cannot overlook the conduct of the accused, which finds support from other evidence and which is inconsistent with the statement recorded by Shetty (PW 6). The manner in which the deceased has introduced in the second statement that after setting her ablaze the accused opened the door and fled, it cannot be said that her statements recorded by both, Rathod as well as Shetty, are free from embellishment. In our opinion, it would not be safe to rely upon such statement/declaration to record conviction under section 302 of IPC and sentence the accused for life imprisonment. We may also mention that no questions whatsoever were put to the accused regarding the burn injuries suffered by him under section 313 of Cr P C. All these circumstances put together, in our opinion,create doubt about the veracity of the dying declarations. The conviction under section 302 of IPC, therefore, cannot be sustained. The trial Court,though has discussed at length regarding the so-called infirmities in recording the dying declarations,overlooked the inconsistencies noticed byus in the dying declarations before holding them true and trustworthy. In our opinion, the benefit of doubt,

insofar as the charge under section 302 of IPC is concerned, will have to be given to the accused.

18. In the result, the conviction under section 302 of IPC is quashed and set aside. The impugned judgment and order convicting the accused under section 498-A of IPC stands confirmed. The trial Court, though convicted the accused under section 498-A of IPC, did not award independent punishment under that provision. Keeping that in view and considering that the accused has already undergone five years of sentence, he may be set at liberty forthwith, if not required in any other case. The appeal, accordingly, stands partly allowed.

(D.B.Bhosale, J.) **(Smt Ranjana Desai, J.)**

HIGH COURT
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.269 OF 2001

Date of Judgment:

10th August, 2005.

For approval and signature

THE HON'BLE SMT.JUSTICE RANJANA DESAI.

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of

the judgment should be sent to Nagpur Aurangabad or Goa offices?

FARAD CONTINUATION SHEET NO.:

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE
CRIMINAL APPEAL NO.269 OF 2001
(Shrikrishna Pralhad Mahakal Vs State of Mah.),

Office Notes, Office Memoranda of coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders.

Shri S.R.Chitnis, Senior Advocate with Mr S.V.Kotwal, for the appellant.

Shri S.S.Tatkare, APP for the respondent.

CORAM: Smt Ranjana Desai &
D.B.Bhosale, JJ.
DATED: 10th August, 2005.

P.C.:

For the reasons recorded separately in the accompanying judgment, the Court passes the following:

"In the result, the conviction under section 302 of IPC is quashed and set aside. The impugned judgment and order convicting the accused under section 498-A of IPC stands confirmed. The trial Court, though convicted the accused under section 498-A of IPC, did not award independent punishment under that provision. Keeping that in view and considering that the accused has already undergone five years of sentence, he may be set at liberty forthwith, if not required in any other case. The appeal, accordingly, stands partly allowed."

For Registrar.